Editor's note: Appealed – aff'd. Civ. No. 74-158 (D. Nev. Oct. 18, 1977), aff'd, (9th Cir. Sept. 18, 1980)

UNITED STATES
v.
MENZEL G. JOHNSON

IBLA 74-170 Decided July 10, 1974

Appeal from the decision of Chief Administrative Law Judge L. K. Luoma holding that the M. J. B. lode mining claims numbers 1 through 6 are null and void. Contest No. N-1918 (A-F).

Affirmed.

Mining Claims: Contests – Mining Claims: Determination of Validity

The United States, acting by and through the Secretary of the Interior, is lawfully empowered to determine the validity of any unpatented mining claim located on federally-owned land.

Mining Claims: Determination of Validity – Mining Claims: Discovery: Generally

A qualifying discovery of a valuable mineral deposit may be lost through the occurrence of any of a number of events, including physical loss of the discovery, the loss of essential transportation facilities, exhaustion of the deposit, or loss of the market of substantial duration.

Mining Claims: Determination of Validity – Mining Claims: Discovery: Marketability – Mining Claims: Locatability of Mineral: Generally

The test of discovery is not satisfied by showing that there is a basis for speculation that there might be a market for the mineral at some future date under altered economic circumstances.

Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally

The cost of building an access way to operate a mine and remove minerals is a cost of the mining operation to be weighed against anticipated returns from a proposed mining venture in determining whether a prudent man would undertake development with a reasonable prospect of success.

Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Mining Claims: Hearings

In order to make a prima facie case of the invalidity of a mining claim, it is not necessary that the contestant go through a "shopping list" of all possible minerals and prove that each one, or each possible combination, is insufficient to qualify the claim where the claimant has not seriously asserted that he has made a discovery of a valuable deposit of those minerals.

APPEARANCES: Franklin Rittenhouse, Esq., McNamee, McNamee & Rittenhouse, Las Vegas, Nevada, for the appellant (withdrew from the appellate proceeding); Milton Wichner, Esq., Los Angeles, California, for the appellant; John McMunn, Esq., Office of the Solicitor, Department of the Interior, San Francisco, California, for the appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

A contest of the validity of the M.J.B. Nos. 1-6 lode mining claims was initiated by the Bureau of Land Management at the request of the National Park Service. The claims are located in sections 15 and 22, T. 20 S., R. 67 E., M.D.M., Clark County, Nevada, on lands which are now within the Lake Mead National Recreation Area under the surface administration of the National Park Service.

The claims, which were located in 1957, were the subject of a previous decision by this Board wherein we held that the claims were not null and void ab initio by reason of their having been

located on land which was then withdrawn under the second form of reclamation withdrawal, and we remanded the case for such further proceedings as necessary to determine the validity of the claims. M. G. Johnson, 2 IBLA 106, 77 I.D. 107 (1971). Following this decision, the claims were examined by mineral examiners employed by the National Park Service, after which this contest was initiated.

After the hearing the Chief Administrative Law Judge, by decision dated November 26, 1973, held all of the claims null and void on the basis of his findings that the mining of the manganese deposits would not be economical, that there is insufficient quality and quantity of gypsum to make it marketable, that copper is present but there was no showing that the mining costs would justify an endeavor to extract it, and that as to the other minerals present, contestee failed to establish that they are present in sufficient quantities to justify active mining operations to extract them. The Judge found that, at most, the contestee had merely shown that mineralization exists which might justify further exploratory work, but that no discovery of a valuable mineral deposit had yet been made on any of the claims which would justify a prudent man in the further expenditure of his labor and means in the reasonable expectation that he could develop a valuable mine, citing Castle v. Womble, 19 L.D. 455, 457 (1894).

Appellant's preliminary and supplemental statements of reasons for appeal recite a long list of alleged errors, upon which, he says, the decision below is premised. Some of these presumed "errors" are completely unfounded. We will deal with these in the order presented.

First, it is contended that the Department of the Interior is without power or jurisdiction to deprive a citizen of any property right guaranteed by the Constitution and by federal statutes. While this naked assertion may be correct as a general statement, it assumes that a property right has vested and that a contest proceeding under the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. (1970), does not afford due process for determining whether a right to public lands which has been claimed is actually a right which has in fact vested. It has been held repeatedly that the United States, acting by and through the Secretary of the Interior, is lawfully empowered to determine the validity of any unpatented mining claim located on federally-owned land. United States v. Coleman, 390 U.S. 599 (1968); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963); Cameron v. United States, 252 U.S. 450 (1919).

Appellant next says that the Judge erred in his premise that the land upon which the mining claim is located "must be shown to be mineral in character at the date the contest was filed at the hearing, rather than on the date when the location was made or minerals were discovered. [sic]" In any case the land must be shown to be mineral in character at the time of discovery and at the time of the hearing. Even so, the Judge did not find that the land involved was nonmineral in character at any time. He did not rule on a charge relating to the mineral character of the land although he noted that mineralization exists on the claims, but he found that no discovery of a valuable deposit of any particular mineral had been made.

Appellant alleges error in the Judge's apparent reliance on the proposition that regardless of any past discovery, "it must be demonstrated that at the time of the hearing a paying mine exists on the mining claim." Obviously, this is an erroneous statement of the law, but there is no slightest inference in the record that the Judge relied upon any such misconception in reaching his decision.

Appellant further states that the Judge's decision is dependent upon the proposition "that the testimony of the locator cannot be accorded any evidentiary significance." Once again, there is absolutely nothing in the record or the decision which remotely suggests that the Judge applied any such bizarre standard or that he believed such a standard existed. The locator's testimony was not excluded; he was given full opportunity to present his evidence; and he did so. That his testimony was indeed accorded "evidentiary significance" is established in the text of the decision on pages 6 and 7, where seven consecutive paragraphs are devoted to a recapitulation of his testimony.

The principle thrust of the appeal appears to be that the locator, having once made a discovery, secures a valid and subsisting right to his claims, and that such discovery may not thereafter be "lost" or the locator's right divested. This statement is simply wrong. A discovery, once made, may be lost through the occurrence of any one of a number of events, including the physical loss of the discovery, the loss of essential transportation facilities, exhaustion of the deposit or a loss of the market of substantial duration (as distinguished from temporary market fluctuations). Best v. Humboldt Placer Mining Co., supra, at 334, citing with approval United States v. Logomarcini, 60 I.D. 371, 373 (1949), and United States v. Houston, 66 I.D. 161, 165 (1959); United States v. Winegar, 16 IBLA 112, 129, I.D. (1974). In Adams v. United States, 318 F.2d 861, 871 (9th Cir. 1963), the

Court held that even though the mining claim once would have satisfied the test of validity, nevertheless the Government rightfully denied a patent to the claimant since, because of changed economic conditions, the claim did not presently satisfy the test. In comparing the circumstances of the Adams case with those before it in Mulkern v. Hammitt, 326 F.2d 896, 898 (9th Cir. 1964), the Court noted:

> * * * The fact that in Adams the attack was upon the Government's refusal to issue a patent, while in the instant case the Government was seeking to nullify the appellant's claim as to which he had never requested or received a patent, does not distinguish the Adams case from the instant one. The problem in both cases is whether the public lands of the United States should be perpetually incumbered and occupied by a private occupant just because, at one time, he had there a valuable mine which has now been completely worked out; or because he had on his location a mineral which, in the then practice of the building industry, had a market, but which, on account of a change in building practice, no longer has a market or a reasonable prospect of a future market; or because, at the time of his discovery, transportation facilities were available which made exploitation feasible, which facilities are no longer available.

This Department has held many times that there may occur a loss of discovery, with the result that an unpatented mining claim may become invalid. United States v. Pumice Sales Corp., A-27578 (July 28, 1958); United States v. Logomarcini, supra; United States v. Houston, supra; United States v. Estate of Alvis F. Denison, 76 I.D. 233 (1969); United States v. Silverton Mining and Milling Co., 1 IBLA 15, 18 (1970), aff'd. sub nom Multiple Use Inc. v. Morton, 353 F. Supp. 184 (D. Ariz. 1972); United States v. R. W. Wingfield, A-30642 (February 17, 1967); United States v. H. B. Webb, 1 IBLA 67 (1970); United States v. Paul M. Thomas,
1 IBLA 209, 78 I.D. 5 (1971); United States v. A. P. Jones, 2 IBLA 140, 149 (1971); United States v. Ray Guthrie, 5 IBLA 303 (1972); United States v. Gunsight Mining Co., 5 IBLA 62, 64 (1972); United States v. Calla Mortenson, 7 IBLA 123 (1972); United States v. Anton Ozanich, Jr., 7 IBLA 144 (1972); United States v. F. E. Gray, 8 IBLA 96 (1972); United States v. Marvin C. Ramsey, 14 IBLA 152 (1974). 1/ "The loss of the discovery was a loss of the location." Gwillim v. Donnellan, 115 U.S. 45, 51 (1885).

1/ Suit for judicial review pending. Ramsey v. Secretary of the Interior, D. Ore., Cir. No. 74-192.

In this case the mineral of primary interest is manganese. The claims are located in the Virgin River Manganese District. Because manganese is essential to steel-making, it is regarded as a strategic mineral. In 1941, this deposit was thoroughly examined by the Bureau of Mines as part of the emergency effort to discover domestic sources, but exploitation of this deposit was not recommended. During the 1950's, the United States undertook to acquire and maintain stockpiles of strategic minerals, including manganese. During this program the Government created an artificial market by buying lower grade manganese ore than was acceptable on the general open market, and paying a premium price for it as a subsidy. This federal program was ended in 1959 and virtually all domestic mining of manganese stopped. Today there apparently is no domestic production at all, and there has been none of any consequence for many years, all requirements being satisfied by the importation of higher grade ore from foreign sources at a price below that which suppliers could hope to meet from any known domestic source. All the evidence of record in this case indicates that the manganese from these claims could not presently compete economically with imported ore. However, appellant argues that since the United States is completely dependent on foreign manganese, the time will come when foreign sources cannot or will not supply this country at a price below the cost of economic domestic production. No evidence was adduced to show that such a drastic market alteration was imminent or even reasonably foreseeable within the relatively near future.

This was precisely the situation and the issue presented in United States v. Estate of Alvis F. Denison, supra, the only difference being that some of the manganese claims in that case had the advantage of having been actually developed as mines and commercially operated to supply the Government's acquisition program, whereas there has never been any development of or sale from the claims at issue in this case, giving it close Kinship with the case of United States v. Theodore R. Jenkins,
75 I.D. 312 (1968). In Denison, it at least might be said that a discovery had been made and was subsequently lost due to economic change, but it cannot even be conclusively established that a discovery was ever effected on the M.J.B. claims. The most that was shown was that the claims were located in 1957 when the Government acquisition program was in effect and that the Government allegedly made some purchases of manganese ore of lower grade than is now known to be present on the M.J.B. claims. It was not shown that this manganese could have been mined and delivered economically even at the subsidized price.

But even assuming that a manganese discovery could be credited to these claims in 1957, that discovery was certainly lost by the economic change through which the present value of all such deposits was lost.

Nor can any presumed former validity of these claims be preserved on the mere showing that the exposed mineralization is sufficient to warrant holding a claim in the hope that at some time in the future the land may become valuable for mining. United States v. Ethel Schell Larsen, 9 IBLA 247 (1973). 2/ The test of discovery is not satisfied by speculation that there might be a market at some future date. United States v. Glen S. Gunn, 7 IBLA 237, 79 I.D. 588 (1972). Evidence of minerals cannot be coupled with speculation that future demand will make valuable that which cannot be economically mined today as a substitute for the finding of minerals of present economic worth. United States v. Elsie Cody, 1 IBLA 92 (1970). It is not enough to show relatively minor mineral values which at some time in the past may have supported mining or which may, depending upon economic and technological developments, warrant further attention at some indefinite future date. United States v. Ruby LaRose Green, A-31031 (March 25, 1970).

We find that the claims are not supported by any present subsisting discovery of manganese.

With reference to the gypsum, it was characterized at one point as "rather impure" by David Jones, one of the mining engineers employed by the Park Service who gave expert testimony for the contestant. (Tr. 50). Subsequently Jones testified that in his opinion the gypsum deposits "are very impure and can never compete in the market in this Los Vegas-Lake Mead area with other gypsum properties which are already under production." (Tr. 65). The claimant testified that in 1957 he engaged a consulting engineer to review the gypsum potential, who in turn contacted an engineer for a fiberboard manufacturer in Los Angeles. That engineer apparently told the claimant that the gypsum "looked all right to him on the surface," but after viewing the access route through the Black Mountains, the "quite precipitous" Saddle Mountains and the Muddy Mountains beyond, the engineer told the claimant, "It will cost $1 million to build a road through those mountains." In this context, we note that this Board has held that the cost of improving a road necessary to haul the material from the claims is properly chargable as a

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2/ Suit for judicial review pending. Larsen v. Morton, D. Ariz., Civ. No. 73-119.

cost of the mining operation, to be weighed against anticipated returns from a proposed mining venture. United States v. Howard S. McKenzie, 4 IBLA 97 (1971). In Big Pine Mining Corp., 53 I.D. 410, 411 (1931), where the method of transportation of the mineral would be by aerial tramway which would have cost $20,000 to $40,000 per mile to construct, the Department held that such cost was properly considered in determining whether a reasonably prudent person would undertake a mining venture on such a deposit.

Mulkern v. Hammitt, supra, concerned gypsum and sand claims for which there was no record of past commercial utilization and no reasonable expectation of future profitable exploitation. See also United States v. Albert B. Bartlett, 2 IBLA 274, 78 I.D. 173 (1971).

We conclude that appellant failed to overcome the contestant's evidence that this impure, remotely-situated gypsum deposit is not a valuable mineral deposit which is subject to appropriation and purchase under the mining law.

Appellant also argues that the contestant failed at the hearing to make a prima facie case that the claims are invalid for silver, gold, and copper, in addition to gypsum, although appellant concedes that a prima facie case may have been made with respect to manganese.

It is clear from the record that manganese is the mineral of primary interest and concern to both the claimant and the examiners who gave testimony on behalf of the contestant. The claimant made casual reference to the fact that other minerals were present, but at no time did he represent that he had made discoveries of gold, silver, or copper which would sustain the validity of the claims. Even so, one of the government examiners, Charles Weiler, had assays for gold and silver and other minerals run on random samples, the results of which are shown in Exhibit 5. Both Weiler and Jones testified that in their respective opinions their examinations did not show the claims to be valuable for mineral. Jones testified that, "The only two mineral products that are on the claim in any responsible quantities are a lowgrade manganese * * * and the gypsum deposits which are very impure * * *." (Tr. 65). This evidence is sufficient to constitute a prima facie showing that there was no discovery of any mineral which could be verified by the examiners, and this was not rebutted by the evidence adduced by the contestee. Even the claimant testified that the claims were located for manganese and gypsum. Although an assay report presented by the claimant (Exh. H) shows .087 oz. per ton gold, and 3.15 oz. per ton silver, and he testified that copper

has been assayed at "a little over 2 percent in that colored rock" (Tr. 99), no attempt was made to establish that these samples were representative of any particular ore body, or that it would be reasonable for a prudent man to undertake a mining venture on the strength of these assays. In order to make a prima facie case of the invalidity of a mining claim, it is not required that the contestant go through a "shopping list" of all possible minerals and prove that each one, or each possible combination, is insufficient to qualify the claim, where even the claimant has not seriously asserted that he has made a discovery of a valuable deposit of those minerals. 3/

Appellant's contention that the wrongful interference in his activities by employees of the National Park Service prevented him from making a discovery. The evidence does not establish this, but even if proven it would not entitle appellant to the land.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Edward W. Stuebing
Administrative Judge

We concur:

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Martin Ritvo
Administrative Judge

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Joan B. Thompson
Administrative Judge

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3/ At the hearing the claimant also mentioned that there is stone of potential gem quality on the claims (Tr. 95), but this mineral value was not alluded to on appeal.